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In the Supreme Court of the United States

OCTOBER TERM, 1963

No.

UNITED STATES OF AMERICA, APPELLANT

v.

ROCCO TATEO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court dismissing the indictments (Appendix, *infra*, pp. 11-18) is reported at 216 F. Supp. 850. An earlier district court opinion setting aside the judgment of conviction is reported at 214 F. Supp. 560.

JURISDICTION

On May 8, 1963, the district court dismissed the indictments on the ground that the prosecution was barred by the Fifth Amendment provision as to double jeopardy (App., *infra*, p. 18). A notice of appeal to this Court was filed on June 6, 1963. Title 18, Section 3731, of the United States Code confers jurisdiction upon this Court to review on direct appeal the decision

of a district court dismissing an indictment in response to a plea in bar.

QUESTION PRESENTED

In 1956, appellee was brought to trial under a five-count indictment. During the trial, but before the case was submitted to the jury, he withdrew his plea of not guilty and entered a plea of guilty to four of the counts. A judgment of conviction on these counts was entered and sentence imposed. Subsequently, in collateral proceedings, the judgment was set aside on the ground that the plea of guilty had been influenced by the court's attitude, made known to the appellee, as to the sentence it would impose if he were found guilty.

The question presented is whether the Fifth Amendment bars appellee's retrial upon the four counts of the indictment as to which he had previously pleaded guilty.

STATEMENT

On May 15, 1956, appellee and another were brought to trial before a jury on a five-count indictment charging bank robbery (18 U.S.C. 2113), kidnapping in connection with the robbery (18 U.S.C. 2113(e)) and conspiracy (18 U.S.C. 371). After four days of trial, appellee withdrew his plea of not guilty and pleaded guilty to all counts except that alleging kidnapping. The next day, the co-defendant also changed his plea and at that time the jury was dismissed. Appellee was sentenced to imprisonment for a total of 22 years and 6 months, and, upon imposition of sentence, the kidnapping count was dismissed on his motion, the prosecution consenting.

On February 8, 1963, Judge Weinfeld granted appellee's motion under 28 U.S.C. 2255 to set aside the judgment of conviction and, in the alternative, for a new trial, on the ground that the defendant—

> * * * was enveloped by a coercive force resulting from the knowledge conveyed to him of the Court's attitude as to sentence which, under all the circumstances, foreclosed a reasoned choice by him at the time he entered his plea of guilty.

As shown in the collateral proceedings, the trial court, on Friday, May 18, 1956, had told counsel, during a conference in the robing room, that if the defendants were found guilty, he would impose a life sentence on the kidnapping count and consecutive sentences on the other counts. As a result of the judge's statement, appellee's counsel urged him to plead guilty, pointing out that the government's case was strong and that there was a substantial likelihood of conviction. On the following Monday, appellee entered his plea, which was accepted by the trial judge after inquiry pursuant to Rule 11 of the Federal Rules of Criminal Procedure.

Following Judge Weinfeld's order setting aside the conviction and granting appellee's alternative prayer for a new trial, a grand jury returned a new kidnapping indictment substantially the same as that previously dismissed.

Prior to the second trial, Judge Tyler sustained defense motions to dismiss both the kidnapping indictment and the counts to which appellee had previously pleaded guilty. This appeal is from the order of Judge Tyler dismissing the original indictment in relation

to which the guilty plea had been entered. No appeal has been taken from the order relating to the kidnapping indictment. Judge Tyler reasoned that the action of the trial judge in coercing the plea resulted in an improper dismissal of the jury before verdict and that therefore retrial was barred by the double jeopardy prohibition of the Fifth Amendment.

THE QUESTIONS ARE SUBSTANTIAL

1. Ever since *United States* v. *Ball*, 163 U.S. 662, 672, it has been settled that "a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment * * * for the same offense of which he had been convicted." See *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 462; *Bryan* v. *United States*, 338 U.S. 552, 560; *Green* v. *United States*, 355 U.S. 184, 189; *Forman* v. *United States*, 361 U.S. 416, 425. As recently as *Forman*, *supra*, this Court described the doctrine as "elementary in our law."

Here, appellee moved to vacate a judgment of conviction on the ground that his guilty plea had been coerced. Judge Weinfeld, finding that coercion was present, set aside the conviction and granted the request for a new trial. To hold that the Fifth Amendment bars a new trial—after the conviction has thus been set aside on the defendant's initiative—violates the "elementary" rule of the *Ball* case. The fact that the judgment was set aside on motion under 28 U.S.C. 2255, rather than on an appeal, is not significant. In either situation, the case must be retried before a jury other than the one which was first impanelled. Under

the controlling decisions, the rule has been that when a defendant procures the setting aside of a judgment, he subjects himself to a retrial of the charge embraced in that judgment.

Judge Tyler was of the view that *Green* v. *United States*, 355 U.S. 184, had implicitly overruled the theory of waiver on which *Ball* rested. To the extent that *Green* holds that an appeal from a conviction of a lesser degree of an offense does not "waive" an acquittal of the greater degree, this may be so.[1] But *Green* did not affect the basic principle that the setting aside of a judgment makes the defendant once again subject to the jeopardy represented by the judgment.

The "mistrial" situations to which Judge Tyler referred are inapposite. In cases like *Downum* v. *United States*, 372 U.S. 734, there is no judgment of any kind, and, save for the defense of former jeopardy, the government would be free to return another day to prosecute under more favorable conditions. No such considerations are present in the case at bar. So long as the prior judgment of conviction remained in force, it would have constituted an absolute bar to retrial. However serious the error of the trial judge, he certainly did not declare a mistrial or terminate the proceedings and thereby present the government with a second opportunity to convict. On the contrary, the proceedings resulted in a judgment of conviction which

[1] In *Green*, the defendant was charged with first degree murder and found guilty of the lesser included offense of second degree murder. His conviction was reversed on appeal. Upon retrial, he was convicted of first degree murder. This conviction was in turn reversed on the ground of double jeopardy.

was conclusive on all parties until the appellee successfully moved to set it aside. Hence, this is not a case of a second prosecution following an initial failure to secure a conviction. It is, rather, a case where a judgment has been set aside, at the defendant's instance, because of a serious trial error.

When a trial judge commits reversible error, a new trial may be, and ordinarily is, directed by the appellate court. In *Smith* v. *United States,* 161 U.S. 85, 90, where the instructions had the effect of a "command to disregard" the defendant's evidence, this Court concluded, "The judge having, in effect, preemptorily withdrawn this matter from their consideration, the defendant is entitled to a new trial." To the same effect, see *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395. The lower courts have consistently followed the same course. See, *e.g., Konda* v. *United States,* 166 Fed. 91 (C.A. 7); *Cummins* v. *United States,* 232 Fed. 844 (C.A. 8); *Dinger* v. *United States,* 28 F. 24 548 (C.A. 8); *United States* v. *Gollin,* 166 F. 2d 123 (C.A. 3), certiorari denied, 333 U.S. 875; *Schwachter* v. *United States,* 237 F. 2d 640 (C.A. 6); *Edwards* v. *United States,* 286 F. 2d 681 (C.A. 5). This rule applies even if a defendant is serving his sentence when he procures the reversal. *Murphy* v. *Massachusetts,* 177 U.S. 155. And the grant of new trial on reversal of a judgment has been deemed particularly appropriate in instances when the defendant, either in a motion to the district court or on appeal, has requested a new trial. *Bryan* v. *United States,* 338 U.S. 552; *Sapir* v. *United States,* 348 U.S. 373, 374 (concurring

opinion of Mr. Justice Douglas); *Forman* v. *United States,* 361 U.S. 416. See, also, *Irvin* v *Dowd,* 366 U.S. 717, 729, and *Reck* v. *Pate,* 367 U.S. 433, 444, which make clear that a prisoner who successfully resorts to habeas corpus may be retried.[2]

A coerced guilty plea has never been regarded as equivalent to a prior acquittal so as to preclude further prosecution. The normal practice is simply to retry the defendant. See, *e.g., Kercheval* v. *United States,* 274 U.S. 220, where this Court held that the coerced plea was inadmissible in the second prosecution. Thus, there is no bar to retrial of a defendant who obtained release under habeas corpus on the ground of a coerced plea of guilty. *United States* v. *Lowrey,* 77 F. Supp. 301 (W.D. Pa.), affirmed *per curiam,* 172 F. 2d 226 (C.A. 3). See, also, *Cain* v. *United States,* 274 F. 2d 598 (C.A. 5), certiorari denied, 362 U.S. 952, holding that where a defendant moved successfully to withdraw a plea of guilty and for a new trial, he cannot claim former jeopardy at the second trial. A coerced plea has been likened to a conviction supported by a coerced confession. *Waley* v. *Johnston,* 316 U.S. 101, 104. Yet, the admission in evidence of a coerced confession does not bar a second trial. *Bram* v. *United States,* 168 U.S. 532, 569; *Reck* v. *Pate, supra.* Only last Term in such a case, *Fay* v.

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[2] Retrial has also been ordered where a judge is disqualified due to personal involvement (*Offutt* v. *United States,* 348 U.S. 11); where the judge interferes with jury deliberations by coercive inquiries (*Jacobs* v. *United States,* 279 F. 2d 826 (C.A. 8)); or where comments and questions of the judge belittle the defendant and his case (*United States* v. *DeSisto,* 289 F. 2d 833 (C.A. 2)).

Noia, 372 U.S. 391, 397, this Court affirmed an order that the defendant's conviction be set aside "and that he be * * * given a new trial forthwith."

Judge Tyler reasoned that coercion occurring after the jury had been impanelled deprived the defendant of his right to that jury's verdict. But precisely the same result obtains when a judge's instructions improperly invade the province of the jury; yet, there is no question as to the propriety of retrial after such an error.

To the extent that a specific request for a new trial is meaningful in determining appropriate relief, that factor is also present here. Appellee originally requested "the vacation of the judgment and discharge from custody or, in the alternative, to be rearraigned to plead *de novo* to the aforesaid indictments". The latter prayer is precisely what Judge Weinfeld granted.

2. Even if the dismissal of the jury upon acceptance of an involuntary plea of guilty could properly be viewed as a "mistrial", the issue of whether retrial after a mistrial constitutes double jeopardy, this Court has held, turns on the particular facts of each case. *Downum* v. *United States,* 372 U.S. 734, 737. The instant case is not characterized by any of the factors which have hitherto led courts to bar retrial after declaration of a mistrial.

As Judge Tyler recognized, in upholding the defendant's claim, "the record here is devoid of any hint of error or prejudicial conduct on the part of the prosecution" (App. *infra,* p. 17). There is no possible room for a contention that the government's case was

going badly; indeed, Judge Weinfeld found that defense counsel was of the opinion "that the Government's case was strong; that there was an excellent chance of conviction" (214 F. Supp. 560, 563). Moreover, a second trial does not involve any element of oppressive harassment or unfairness. Not only would appellee receive what he asked for in the first place; he stands to benefit from any flaws which the passage of time may have created in a formerly strong case. He also has the tactical advantage resulting from the fact that a substantial portion of the government's case has been revealed, while his own case is still unexposed.

If a judge errs in the course of a trial and then concludes that his action or ruling can only be satisfactorily cured by a new trial, certainly he should be encouraged to take steps forthwith, *i.e.*, to declare a mistrial, rather than persist in his error and leave corrective measures to appellate or collateral proceedings. We fail to see why termination of a trial in such circumstances should ever yield a different result from that which would follow from a subsequent reversal on the same ground. Moreover, the prevailing decisions confirm the view that a mistrial resulting from a judge's recognition of his error is not an obstacle to retrial. *Scott* v. *United States*, 202 F. 2d 354 (C.A. D.C.), certiorari denied, 344 U.S. 879; *United States* v. *Giles*, 19 F. Supp. 1009 (W.D. Okla.); *State* v *Helm*, 66 Nev. 286, certiorari denied, 339 U.S. 942; *People* v. *Thomas*, 15 Ill. 2d 344, certiorari denied, 359 U.S. 1005.[3] No more should the judge's error in this case—

[3] See, also, American Law Institute, Model Penal Code, Tentative Draft No. 5, Sec. 1.09(4).

an error nowise induced by the prosecution and one which also terminated the trial—be deemed a bar.

A contrary approach, we believe, would prejudice the sound administration of the criminal law. A trial judge may well hesitate to terminate a trial, even though he believes that the circumstances warrant this course, if his action may produce the untoward consequence that the public will be thereby permanently deprived of its right to have the underlying charge adjudicated.

CONCLUSION

This case raises substantial questions of public importance which warrant resolution by this Court. It is respectfully submitted that probable jurisdiction should be noted.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME NELSON,
Attorneys.

AUGUST 1963.

APPENDIX

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C 149-341

63 Cr. 299

UNITED STATES OF AMERICA

against

ROCCO TATEO, DEFENDANT

OPINION

TYLER, *D.J.*

Rocco Tateo, who is presently scheduled to go to trial on May 6, 1963 upon the above two indictments charging offenses arising under the federal bank robbery statute, has made several motions to dismiss these indictments. His principal motion, which will be treated in this opinion, presents a serious question relating to the meaning and application of the provision of the Fifth Amendment to the Constitution declaring that no person shall ". . . be subject for the same offense to be twice put in jeopardy of life and limb. . . ."

To put the double jeopardy questions here presented in proper perspective, it is necessary to summarize the previous history of this case.

On March 2, 1956, the County Trust Company branch bank in Port Chester, New York, was robbed of approximately $188,000. Thereafter, on March 30, 1956, a grand jury sitting in this district indicted three individuals, Arthur Paisner, Angelo John and Rocco Tateo, for various offenses arising out of this robbery. The indictment, No. C 149-341, contained five counts which charged bank robbery by force and violence (18 U.S.C. 2113(a)); taking and carrying away with in-

tent to steal (18 U.S.C. 2113(b)); receiving and possessing the proceeds of the bank robbery (18 U.S.C. 2113(c)); kidnapping in connection with the robbery (18 U.S.C. 2113(e)); and a conspiracy to commit the substantive offenses (18 U.S.C. 371).

Prior to trial of this first indictment, No. C 149-341, defendant Arthur Paisner pleaded guilty to all counts except the kidnapping count. On May 15, 1956, the trial commenced under this indictment as to the two remaining defendants before a judge of this court and a jury. After four days of trial, during which a jury was selected and impanelled and testimony was taken, defendant Tateo withdrew his plea of not guilty and on May 21, 1956 pleaded guilty to all counts, with the exception of the kidnapping count. The following day, May 22, 1956, defendant Angelo John did likewise; on the same day the jury was discharged.

On June 5, 1956, all defendants were sentenced by the trial judge, who imposed a total sentence upon Tateo of 22 years and 6 months as follows: robbery by force and violence—20 years; taking and carrying away with intent to steal—10 years; receiving and possession—10 years; and conspiracy—2 and ½ years. The three substantive count sentences were to run concurrently with each other, and the sentence for conspiracy was to run consecutively thereafter.

As soon as this sentence had been imposed on June 5, 1956, and in accordance with ordinary routine followed in this district, Tateo's counsel moved to dismiss the kidnapping count. Upon consent of the prosecution, this motion was granted. Tateo was immediately remanded.

He remained in prison, serving the imposed sentence, until shortly after February 8 of this year, on which date another judge of this court granted Tateo's motion pursuant to 28 U.S.C. 2255 to vacate and set

aside the judgment of conviction on the ground that Tateo's plea of guilty entered on May 21, 1956, had been "coerced" by a statement or statements of the trial judge. *United States* v. *Tateo*, 214 F. Supp. 560 (S.D.N.Y. 1963).[1] On March 28, 1963, some weeks after that order had been entered, another grand jury sitting in this district returned an indictment, No. 63 Cr. 299, of one count against Rocco Tateo. This count is substantially the same as the original kidnapping count.

The government's position, in its papers in opposition to the defendant Tateo's present motion, is that the February 8, 1963 order automatically re-instated the four counts of indictment No. C 149-341 to which Tateo pleaded guilty, but may not have re-instated the kidnapping count, since that count has been dismissed on June 5, 1956 upon Tateo's motion and with consent of the government. Further, it is the government's theory that since the kidnapping subsection (Section 2113(c)) of the federal bank robbery statute provides a penalty of death upon recommendation of the jury after conviction, this is thus a capital charge and not barred by statute of limitations.

At the first hearing and argument of this motion by defendant, both his papers and those of the government focused entirely upon the double jeopardy question inherent in the "revival" of the kidnapping count. As the argument developed, this court informed all counsel that in its view a substantial double jeopardy question might also be presented respecting those counts to which Tateo pleaded guilty on May 21, 1956

[1] Although the order setting aside the judgment of conviction is expressly responsive to Tateo's "motion to vacate and . . . for a new trial", 214 F. Supp., at p. 568; *cf.*, 28 U.S.C. 2255, the record makes clear that the court did not have before it, and did not intend to pass upon, the merits of the issue decided herein.

after some four days of trial before a jury. Accordingly, further briefs were submitted and a re-argument was had on April 26, 1963 on all aspects of the double jeopardy problem presented by this case. Essentially, this problem breaks down into two questions.[2]

1. Will a trial of Tateo upon Indictment No. 63 Cr. 299 work an unconstitutional second jeopardy for the crime charged in Count 3 (the kidnapping count) of Indictment No. C 149-341, which was dismissed on June 5, 1956?

2. Will a new trial of Tateo upon Counts 1, 2, 4 and 5 of No. C 149-341, to which Tateo made his coerced plea of guilty, work an unconstitutional second jeopardy?

This court is constrained to hold that both questions must be answered in the affirmative.

This case is crucially different from the usual instance in which a conviction is set-aside under 28 U.S.C. 2255 and a new trial is not barred by the principle of double jeopardy. The critical distinguishing factor is that Tateo's trial commenced but was not completed.

The principle of double jeopardy made controlling by this fact is that re-trial after the termination-before-verdict of a prior trial is barred unless the termination was either consented to or based upon "exceptional circumstances".

Since neither constitutionally sound consent nor an "exceptional circumstance" underpinned the termination here, a second trial is constitutionally impermissible.

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[2] Defense counsel also urge that re-trial of Counts 2 and 4 of No. C 149-341 is barred by the circumstance that Tateo has completed the mandatory portions of the concurrent ten year sentences imposed on these counts on May 21, 1956. *United States* v. *Bayless*, 147 F.2d 171 (8th Cir. 1945). I do not reach this issue.

Federal courts, in seeking to safeguard a defendant's "valued right to have his trial completed by the particular tribunal summoned to sit in judgment on him", *Downum* v. *United States;* — U.S. —, decided April 22, 1963, 31 Law Week 4369, at p. 4370), have been guided by the strictures of Mr. Justice Story who, in writing for a unanimous Supreme Court in 1824, said:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public has for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." (*United States* v. *Perez,* 9 Wheat. 579, at p. 588 (1824)).

According to the record, the trial judge made his statements, which have been found to have had a coercive effect upon Tateo, on Friday, May 18, 1956. On the following Monday Tateo entered his plea of guilty. The jury was discharged the next day, Tuesday, May 22.

Realistically, Tateo's consent to termination cannot be separated from his decision to plead guilty. The sole decision which Tateo faced was whether to finish the trial in the hope of a jury acquittal, or to plead guilty at once. Since it has been judicially determined that Tateo's plea of guilty was coerced by statements of the trial judge, it follows that he was coerced from availing himself of his Fifth Amendment right to go to the original jury for its verdict of guilt or innocence. Nor can the dismissal of the original kidnapping count, insofar as it depended upon the decision or "consent" of Tateo, be deemed anything but an incident of this same coerced plea of guilty.

With regard to the "exceptional circumstances" principle, it is sufficient that acceptance of the coerced guilty plea, and, in a sense, the very inducement of it as well, constituted error, whether termed error of fact, of law, or of both. Hence this cannot in reason be the basis for that "imperious necessity," *Downum* v. *United States, supra,* 31 Law Week, at p. 4370, which must be present to justify the termination.

Finally, the government especially argues that Tateo "waived" his right to be secure from double jeopardy by successfully attacking his conviction. But in *United States* v. *Green,* 355 U.S. 184, 192 (1957), the Supreme Court endorsed the view expressed by Justice Holmes, dissenting in *Kepner* v. *United States,* 195 U.S. 100, 135 (1904), that where double jeopardy is at issue, "It cannot matter that the prisoner procures the second trial."

For, as Justice Holmes went on to state in the passage quoted by the court in *Green*: ". . . [I]t cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express

clause in the Constitution of the United States." 195 U.S. at p. 135.[3]

The Supreme Court has stated, in *Downum* v. *United States, supra,* 31 Law Week at page 4370:

> "Harrassment of an accused by successive prosecutions or declaration of a mis-trial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. *Gori* v. *United States, supra,* p. 369. But those extreme cases do not mark the limits of the guarantee."

The recent decision in *Downum* makes clear that individual applications of the rule of double jeopardy do not hinge upon a finding of prejudice to the defendant beyond that prejudice which inheres in foreclosing him forever from the chance to be acquitted by the tribunal before whom he is first placed in jeopardy. *United States* v. *Perez,* 9 Wheat. 579 (1824). The result here reached is thus compelled completely without regard either for the possible guilt of Tateo or for the unquestionably high purpose which prompted the trial judge to act as he did on May 18 and 21, 1956.[4]

Accordingly, it is determined that Indictments No. C 149-341 and No. 63 Cr. 299 must be dismissed as against Rocco Tateo.

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[3] Just as the defendant in *Green* was held not to have waived his right to be secure from re-trial after there had been an acquittal, so I hold here that Tateo has not waived his right to be secure from re-trial after there has been an improper termination.

[4] And, similarly, without regard for the fact that the record here is devoid of any hint of error or prejudicial conduct on the part of the prosecution. *Fong Foo et al* v. *United States,* 369 U.S. 141 (1962); *Gori* v. *United States,* 367 U.S. 364, at p. 373 (1961) (dissenting opinion by Douglas, J.).

Settle order in accordance with the foregoing for submission to this court for signature at 10:00 a.m. on May 8, 1963.

Dated: New York, N.Y., May 3, 1963.

H. R. TYLER, JR.
U.S.D.J.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C 149-341

63 Cr. 299

UNITED STATES OF AMERICA,

against

ROCCO TATEO, DEFENDANT.

ORDER

The defendant Rocco Tateo, having moved this Court for an order dismissing Indictments C 149-341 and 63 Cr. 299, on the grounds that trial of those indictments is barred by the prohibition against double jeopardy of the Fifth Amendment of the Constitution of the United States, and said motion having come on to be heard on April 16, 1963, the Court having heard O. John Rogge, Esq., in support of said motion, and Robert Morgenthau, United States Attorney for the Southern District of New York by Peter E. Flemming, Jr., and Charles A. Stillman, Assistant United States Attorneys in opposition to said motion, and further argument of said motion having been had on April 26, 1963, the Court having heard O. John Rogge, Esq., and Robert Kasanof, Esq., attorneys for the defendant

Tateo in support of said motion, and Robert Morgenthau, United States Attorney for the Southern District by Peter E. Flemming, Jr., and Charles A. Stillman, Assistant United States Attorneys, in opposition to said motion,

NOW THEREFORE, on the motion of O. John Rogge, Esq., and Robert Kasanof, Esq., attorneys for the defendant Tateo, and after hearing the parties and due deliberation having been given, and the Court having rendered its decision, and filed its opinion on May 3, 1963, and on the arguments, briefs and memoranda, and on the official files of this Court in Indictments C 149-341 and 63 Cr. 299, and on all the proceedings heretofore had herein, it is hereby:

ORDERED, that Indictments C 149-341 and 63 Cr. 299 be and they are both hereby dismissed as against Rocco Tateo on the ground that their trial would subject him to being twice put in jeopardy in violation of the Fifth Amendment, and it is further

ORDERED, that pursuant to 18 U.S.C. § 3731 the defendant Rocco Tateo shall be discharged forthwith and admitted to bail on his own recognizance, subject to the further orders of this Court.

Dated: New York, New York, May 8, 1963.

H. R. TYLER, JR.,
U.S.D.J.

Consented to as to form,

ROBERT MORGENTHAU,
United States Attorney
for the Southern District of New York.

By: PETER E. FLEMMING, JR.,
Assistant United States Attorney
for the Southern District of New York.

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